UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:01-CV-1271-ORL-19 JGG

CLAYTON HOSPITALITY GROUP, INC.,

Plaintiff,

v.

ORANGE COUNTY, a political subdivision of the State of Florida and EARL K. WOOD, in his official capacity as Orange County Tax Collector,

Defendants.

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ORDER

This case is before the Court on the following matters:

1) Plaintiff Clayton Hospitality Group, Inc.'s Motion for Summary Judgment (Doc. No. 28) and Defendants Orange County and Earl K. Wood's Response to Plaintiff Clayton Hospitality Group, Inc's Motion for Summary Judgment (Doc. No. 36).

2) Defendants Orange County and Earl K. Wood's Motion for Final Summary Judgment and Memorandum in Support Thereof (Doc. Nos. 40 & 41) and Plaintiff Clayton Hospitality Group, Inc.'s Response In Opposition

to Defendants Orange County and Earl K. Wood's Motion for Final Summary Judgment (Doc. No. 45).

Plaintiff Clayton Hospitality Group, Inc. ("Clayton") brings suit against Defendants Orange County and Earl K. Wood (collectively "County") under 42 U.S.C. § 1983. The suit is a facial challenge to the procedure in the County's Adult Entertainment Code ("AEC") whereby an adult entertainment license is transferred by the County following a change in ownership of an adult entertainment establishment.

Clayton maintains that the AEC's transfer provision is facially unconstitutional under the First Amendment to the United States Constitution. Clayton seeks a judgment declaring a specific portion of the transfer provision unconstitutional and an injunction permanently enjoining the County from enforcing the provision. Both parties have moved for summary judgment and have submitted depositions and notices of filing in support of their respective positions. *See* (Doc. Nos. 30-33, 37-39).

BACKGROUND

Clayton is the operator of an adult entertainment establishment located at 527 North Semoran Boulevard, Orlando, Florida. *See* (Doc. No. 28). The business operates under the name of "The Diamond Club." *Id.*

Clayton purchased the adult entertainment license and trade name for the Diamond Club from InnCon America, Inc. on July 25, 2001. *See* (Doc. No. 32). Gerald Uranick, President of Clayton, assumed control of the business on the day of purchase and took physical possession of the property on August 1, 2001. *See id.* Mr.

Uranick performed some maintenance and cleanup on the property. *See id.*

On August 7, 2001, Mr. Uranick filed an application with the Occupational License Department of the Orange County Tax Collector for a transfer of the adult entertainment license for the Diamond Club from InnCon America, Inc. to Clayton. *See* (Doc. No. 38, Exh. A). As part of this application, Mr. Uranick submitted documentation showing that Clayton had purchased InnCon's entertainment license for the Diamond Club, that the landlord of the property at 527 North Semoran Blvd. and InnCon had executed a mutual termination of lease and that Clayton and the landlord of the property had entered into a lease. *See id.*

Section 3-26 of Orange County's AEC provides that no adult entertainment establishment can operate without having been granted an adult entertainment license by the. Tax Collector. *See* (Doc. No. 33).[1] The AEC also provides that anyone who acquires an already-licensed adult entertainment business can obtain a transfer of the license by applying to the Tax Collector for a transfer. *See* (AEC § 3-33). An applicant must file a transfer application pursuant to § 3-27. The application is then investigated pursuant to § 3-28 and is granted or denied by the Tax Collector under § 3-29. *See* (AEC § 3-33).

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[1] A copy of Orange County's Adult Entertainment Code is contained in Document Number 33, which is Exhibit A of Clayton's Motion for Summary Judgment. All future references to the Adult Entertainment Code will be cited as "AEC" followed by the appropriate section number.

Section 3-28(a) provides that "upon receipt of an application properly filed . . ., the tax collector shall immediately . . . send photocopies of the application to the sheriff, the building department, the fire rescue services division, the health department and the zoning department. *See* (AEC § 3-28). According to § 3-28(b):

> [e]ach department shall promptly conduct an investigation of the applicant, application and the proposed establishment in accordance with its responsibilities summarized at section 3-9 of this chapter.[2]

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[2] Under § 3-9, each department has the following responsibilities:

> The sheriff is responsible for verifying information contained on an application pursuant to section 3-27(b) (1) through (5), for inspecting any proposed, licensed or nonlicensed establishment in order to ascertain whether it is in compliance with applicable criminal statutes and ordinances, including those set forth at article V of this chapter, for determining whether any applicant for a license has been convicted of a felony or specified criminal act within the previous five (5) years, and for enforcing applicable criminal statutes and ordinances, including those set forth at article V of this chapter.
>
> The building department is responsible for inspecting any proposed or existing establishment in order to ascertain whether it complies with or is complying with Article IV of this chapter and applicable building codes, statutes, ordinances, and regulations.
>
> The fire and rescue services division is responsible for inspecting any proposed or existing establishment in order to ascertain whether it complies with or is complying with article IV of this chapter and all applicable fire codes, statutes,

(continued...)

(AEC § 3—28 (b)).

After its investigation each department must prepare and forward to the Tax Collector a report stating whether the department found a violation of the applicable building, fire, health or zoning codes. (AEC § 3-28(c)). The Tax Collector must grant or deny an application wi hin thirty (30) days from the date of its proper filing and must notify the applicant within seven days of the decision. (AEC § 3-29(a)(1)). If none of the departments have made a finding within thirty days that would require denial of the license or transfer, the Tax Collector must grant the application. (AEC § 3-29(b)). Additionally, any decision of the Tax Collector "may be immediately reviewed as a matter of right by a court of competent jurisdiction upon the filing of an appropriate pleading by an aggrieved party." (AEC § 3-10).

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[2](...continued)
ordinances, and regulations.

The health department is responsible for inspecting any proposed or existing establishment in order to ascertain whether it complies with or is complying with article IV of this chapter and all applicable health codes, statutes, ordinances, and regulations.

The zoning department is responsible for ascertaining whether any proposed or existing establishment complies with all locational requirements of this chapter, applicable portions of articles III and IV of this chapter, all applicable zoning regulations, and whether a licensed establishment is complying with article IV of this chapter and all applicable zoning regulations and land use laws.

(AEC § 3—9(2)—(6))

Upon receiving Clayton's application for a transfer, the Tax Collector forwarded copies of it to the appropriate departments. On August 22, 2001, building division inspectors conducted an inspection of the property and found several violations of the applicable building codes. *See* (Doc. No. 38, Exh. E). The inspector notified Mr. Uranick of the violations which included faulty stairway construction and exterior lighting violations. *See* (Doc. No. 38, Exh. F). By letter dated September 6, 2001, the Tax Collector denied Clayton's application for a transfer because of the building violations. *See* (Doc. No. 38, Exh. G).

On or about October 30, 2001, Clayton filed its original Complaint in the instant action against Orange County. *See* (Doc. No. 1). Clayton alleged that the portion of the AEC that requires a building inspection for the Tax Collector to transfer a license is facially unconstitutional.

Clayton also filed on October 30, 2001, a second application for a transfer of the existing adult entertainment license for the Diamond Club. *See* (Doc. No. 38, Exh. J). Once again, the Tax Collector forwarded copies of the application to the appropriate departments. The building division inspectors performed an inspection and again found building violations. *See* (Doc. No. 38, Exh. K). Specifically, the violations involved the use of exterior lighting that was not marked "suitable for wet locations" and the construction of a raised floor area that was apparently done without a permit.

However, after the building inspection Clayton corrected all of the listed violations. On November 21, 2001, the building division notified the Tax Collector that

the building division would approve the application for transfer as the violations were corrected. *See* (Doc. No. 38, Exh. L). Accordingly, on November 28, 2001, the Tax Collector approved the transfer of InnCon's adult entertainment license to Clayton. *See* (Doc. No. 38, Exh. H).

Despite the fact Clayton ultimately received the transfer of the adult entertainment license, Clayton filed an Amended Complaint on January 4, 2002. *See* (Doc. No. 24). Clayton seeks a declaratory judgment that the transfer provision of the AEC facially violates the First Amendment and a permanent injunction prohibiting the County from enforcing it.[3] *See id.* Additionally, Clayton adds a count for money damages seeking reimbursement of its two-hundred dollar ($200) application fee which it paid to the County upon filing the second transfer application. Clayton maintains that if the transfer provision is facially invalid, it is entitled to recover the money it spent to reapply for the transfer. *See id.*

Both parties have moved for summary judgment and agree that the facts of the case are undisputed and that summary judgment is appropriate. The County argues that Clayton's claims are not justiciable as he has already received the license and has no definite intent to transfer a license in the future. Additionally, the County asserts that the AEC is facially constitutional.

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[3] Clayton also asserted a claim that the transfer provision violates the Fourteenth Amendment, but Clayton has withdrawn that argument. *See* (Doc. No. 47).

LEGAL STANDARD:

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." *Id.* The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986)

In determining whether the moving party has satisfied the burden, the court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255. The court may not weigh conflicting evidence or weigh the credibility of the parties. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 919 (11th Cir. 1993) (citation omitted). If a reasonable fact finder could draw more than one inference from the facts, and that inference creates an issue of material fact, then a court must not grant summary judgment. *Id.* (citation omitted).

ANALYSIS:

1) Justiciability of Clayton's Claims:

The County initially argues that Clayton's claims are not justiciable because they are moot and not ripe.

The County further argues that Clayton lacks standing to assert the claims. Specifically, the County claims that because Clayton has already received the license for which it applied, there is no "live controversy" as to which this Court may rule.

However, Clayton's Amended Complaint contains only a facial challenge to the AEC provisions. *See* (Doc. No. 24). Clayton's claim that the AEC is unconstitutional as applied by the County was withdrawn in the Amended Complaint. Clayton's remaining facial challenge to the AEC is a justiciable claim despite the fact Clayton received its license.

The United States Supreme Court has recognized the right of a plaintiff to facially challenge a licensing statute without first applying for a license. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755 (1988). It is well established that "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *Lakewood*, 468 U.S. at 755.

Clayton argues that the transfer provisions of the AEC grant County officials unbridled discretion in granting or denying a transfer application. Such allegations are sufficient to support a facial challenge of the ordinance.

2) Constitutionality of the Adult Entertainment Code:

This case deals with the constitutionality of a licensing scheme that regulates First Amendment protected businesses.[4] The United States Supreme Court has found that a licensing scheme that extends to city officials the discretion to deny permits constitutes a prior restraint "that avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). In the case of a licensing requirement for the operation of adult entertainment businesses, two such procedural safeguards are required. *FW\PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990).

First, the licensor must be required to make the decision whether to issue the license within a specified, brief period of time. *See Freedman*, 380 U.S. at 58-59. A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing protected speech. *See City of Dallas*, 493 U.S. at 227. Second, license applicants must be guaranteed prompt judicial review in the event the license is erroneously denied. *See id.* at 228.

Clayton asserts that the AEC provision at issue fails both requirements of a specific time frame and prompt judicial review. However, Clayton concedes that his argument that the ordinance fails to provide prompt

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[4] There is no dispute that the nude dancing that occurs in Diamond Club constitutes expression protected under the First Amendment. *See Redner v. Dean*, 29 F.3d 1495, 1499 (11th Cir. 1994)

judicial review is not supported by the Eleventh Circuit Court of Appeals' decision in *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999). In *Boss Capital* the Eleventh Circuit Court of Appeals found that access to prompt judicial *review*, as opposed to judicial *resolution*, is sufficient for adult entertainment licensing ordinances. *See Boss Capital*, 187 F.3d at 1256-57. The Court agrees that under *Boss Capital*, the AEC sufficiently provides for prompt judicial review of the Tax Collector's decision. *See* (AEC § 3-10). Clayton concedes this as well, but makes his argument for the purpose of preserving it for appeal.

Clayton next maintains that the transfer provision of the AEC gives County officials unbridled discretion to deny a transfer and that the discretion is not adequately restrained by the two procedural safeguards.

Clayton relies solely on the Eleventh Circuit Court of Appeals opinion in *Miami Herald Publ. Co. v. City of Hallendale*, 734 F.2d 666 (11th Cir. 1984), for its argument that the AEC gives officials unbridled discretion. In *Miami Herald*, the Eleventh Circuit reviewed a city ordinance that created a licensing requirement for the operation of any business in the city of Hallendale, Florida. *See Miami Herald*, 734 F.2d at 669. The ordinance provided that a license could not be issued if the city commission found that a business did not comply with "applicable ordinances or regulations." *Id.*

The Miami Herald, a newspaper publishing company, challenged the licensing requirement, claiming the ordinance was facially unconstitutional. *See id.* The Miami Herald claimed that the ordinance granted uncontrolled discretion to city officials in deciding

whether to grant licenses and therefore provided the officials the opportunity to discriminatorily deny licenses. *See id.* at 674.

The Eleventh Circuit Court of Appeals affirmed the district court finding that the ordinance was facially unconstitutional. Specifically, the ordinance allowed a license to be denied if any violation of any provision of the entire city code was found. *See id.* at 675. The licensing ordinance did not specify which ordinances were "applicable" and instead gave city officials broad discretion to determine which ordinances applied to a particular applicant. *See id.* Additionally, the licensing ordinance failed to specify the requisite procedural safeguards, providing no time limits within which the city commission was to decide whether an applicant would be granted a license. *See id.* at 675-76. Finally, the ordinance furnished no means for prompt judicial review of city commission decisions. *See id.*

In ruling that the ordinance was unconstitutional due to its broad grant of discretion to city officials unaccompanied by the appropriate procedural safeguards, the Court noted, however, that if the ordinance had specified the provisions with which an applicant must comply and had provided the requisite procedural safeguards, then the city official's discretion would likely be "satisfactorily curtailed." *See id.* at 674, n.4.

In this case, the transfer provisions of the AEC lack the constitutional infirmities contained in the Hallendale ordinance. Specifically, the licensing requirement delegates the determination of whether a property is in compliance with a code to the appropriate administrative departments, not to the city commission. The ordinance

also specifies the ordinances with which an applicant must comply. Unlike the ordinance in *Miami Herald*, the AEC requires the County departments to inspect for violations of applicable building, zoning, fire and health ordinances or codes relevant to such departments including criminal statutes and ordinances in the case of the Sheriff. See (AEC § 3-9). The ordinance does not give city officials uncontrolled discretion to deny a license based on violations of any part of the entire Orange County Code. Instead, the ordinance specifies which provisions are applicable.

Additionally, the ordinance provides the requisite procedural safeguards established in *FW\PBS v. City of Dallas*, 493 U.S. 215 (1990). Section 3-29 requires the Tax Collector to grant or deny a transfer license within thirty (30) days from the date of filing the application. The decision must be made within thirty days regardless of whether the appropriate departments have conducted their inspections. After thirty days, if none of the departments has made a finding that the application should be denied, the Tax Collector must grant the license transfer. *See* (AEC § 3-29(b)). This provision provides a satisfactory procedural safeguard as required by *City of Dallas*. *See Redner v. Dean*, 29 F.3d 1495, 1500 (11th Cir. 1994) (finding that time limitations that require a decision within 45 days are reasonable). The AEC also provides for prompt judicial review (AEC § 3-10), and as previously noted, Clayton concedes that the Court is bound by the Eleventh Circuit Court of Appeals' decision in *Boss Capital* upholding a judicial review provision like the one contained in the AEC.

Clayton additionally argues that the thirty day time limitation is illusory because the Tax Collector may deny

an application based on any minor code violation, and therefore an applicant is forced to reapply and begin the process all over again. Clayton claims that its previous applications have taken much longer than thirty days for determination when considered together because it has been forced to reapply several times due to various code infractions. According to Clayton, the licensing scheme allows the County to prolong the process indefinitely by finding code violations and denying an application which then forces an applicant to successively reapply for a transfer license.

The Court's task, however, is to analyze the AEC transfer provision as it is written and not as the County could hypothetically enforce it. In a facial challenge, the facts of the challenging party's case are irrelevant.[5] *See Miami Herald*, 734 F.2d at 674. Accordingly the Court finds that the AEC's license transfer procedure does not grant unfettered discretion to County officials and provides adequate procedural safeguards to pass muster under the First Amendment.

Based on the foregoing the Court **RULES** as follows:

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[5] The facts of the record show that although Clayton's application was initially denied, Clayton reapplied and corrected the code violations discovered in the inspection conducted during the reapplication process. The County did not deny Clayton's application immediately upon finding a code violation and instead allowed Clayton to correct the violations during the thirty day time period. After Clayton made the corrections, the County granted the license transfer during the thirty day time period. Thus, the ordinance operated to provide Clayton with a decision within a reasonable period of time.

1) Plaintiff Clayton Hospitality Group, Inc.'s Motion for Summary Judgment (Doc. No. 28) is **DENIED**.

2) Defendants Orange County and Earl K. Wood's Motion for Summary Judgment (Doc. No. 40) is **GRANTED**.

3) The Clerk is directed to enter judgment in favor of the Defendants Orange County and Earl K. Wood and against Clayton Hospitality Group, Inc. And to **CLOSE THIS CASE**.

DONE AND ORDERED at Orlando, Florida, this 30th day of July, 2002.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record